Abdullah Zawawi bin Yusoff v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05–10–90
JEMURI SERJAN CJ (BORNEO), EDGAR JOSEPH JR AND MOHAMED DZAIDDIN SCJJ
2 AUGUST 1993

Criminal Law *— Trafficking in dangerous drugs — Possession — Possibility of access by others to premises where drugs were found — Possibility of drugs being planted — Dangerous Drugs Act 1952 s 39B(1)(a)*

Criminal Law *— Trafficking in dangerous drugs — Possession — Whether accused's conduct of running away indicated a sense of guilt — Dangerous Drugs Act 1952 s 39B(1)(a)*

Criminal Procedure *— Trial — Trafficking in dangerous drugs — Police acted on tip-off — Onus on prosecution to exclude possibility of access by others to premises where drugs were found — Dangerous Drugs Act 1952 s 39B(1)(a)*

Criminal Procedure *— Trafficking in dangerous drugs — Need to view whole of evidence objectively and from all angles — Evidence which could implicate others besides accused — Evidence left too many questions unanswered*

The appellant and his wife were jointly charged with the offence of trafficking in dangerous drugs. 592.6g of cannabis was found in a wooden box in the house which at that time was occupied by the appellant, his wife, their children and another man. The police raided the house, which was still under construction, as a result of a tip-off alleging drug trafficking in the house. At the conclusion of the trial, the wife of the appellant was acquitted and discharged but the appellant was convicted and sentenced to death. The appellant has appealed.

Held, allowing the appeal:

(1) As against the discovery of the box containing the drugs, there was the evidence of possible access to the uncompleted house by others, including the wife, the other man in the house and the informer. It was possible that the informer might have planted the drugs in the box.

(2) The conduct of the appellant in running away when the discovery of the drugs was announced was consistent with his having known of the presence of the drugs in the box before their discovery, indicating thereby a sense of guilt. On the other hand it was conduct equally consistent with the appellant being in a state of pure panic. An innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way.

(3) Given the fact that this was a case where the police were acting on a tip-off, the onus was not on the defence to prove possibility of access by others but on the prosecution to exclude such possibility.

(4) Although there were several strands of evidence pointing to the appellant's guilt, not one of them alone was of great moment and

the question arises whether it could be said that there was sufficient evidence to support a verdict of guilty. This question must be answered in favour of the appellant considering that there was more than one way in which the evidence adduced by the prosecution might be viewed. The evidence indeed could have been regarded as implicating the appellant or the wife or both of them or the informer or even the other man living in the house.

(5) Having examined the evidence led by the prosecution afresh, the court found that the evidence left too many questions unanswered, with the result that the evidence could have implicated not just the appellant but also the others as well.

[Bahasa Malaysia summary

Perayu dan isterinya telah dituduh bersesama dengan kesalahan mengedar dadah berbahaya. 592.6g dadah cannabis telah dijumpai di dalam sebuah kotak kayu di dalam rumah yang pada masa itu didiami oleh perayu, isterinya, anak-anak mereka dan seorang lelaki yang lain. Polis telah menyerbu rumah tersebut, yang belum selesai dibina, atas maklumat tentang pengedaran dadah dari rumah tersebut. Pada penghujung perbicaraan, isteri perayu telah dibebaskan dan dilepaskan, manakala perayu telah disabitkan dan dikenakan hukuman mati. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Merujuk kepada kotak kayu yang mengandungi dadah itu, terdapat keterangan yang menunjukkan kemungkinan orang-orang lain yang mempunyai akses kepada rumah itu, termasuk isterinya, lelaki lain yang tinggal di sana dan pemberi maklumat itu. Pemberi maklumat itu mungkin telah meletakkan dadah itu di situ untuk memerangkap perayu.

(2) Kelakuan perayu melarikan diri dari rumah itu apabila diberitahu bahawa dadah itu telah dijumpai adalah konsisten dengan pengetahuan beliau tentang dadah di dalam kotak itu dan dengan demikian menunjukkan perasaan bersalah. Sebaliknya pula, kelakuan tersebut juga konsisten dengan perayu berada dalam keadaan cemas. Seseorang yang tidak bersalah mungkin akan bertindak dengan bodoh apabila berhadapan dengan kemungkinan ditahan untuk suatu tuduhan yang membawa hukuman mati.

(3) Memandangkan bahawa di dalam kes ini pihak polis telah bertindak akibat daripada maklumat yang diterima, bukanlah beban pihak pembela untuk membuktikan kemungkinan bahawa orang lain mempunyai akses kepada rumah itu tetapi adalah beban pihak pendakwa untuk menidakkan kemungkinan itu.

(4) Sungguhpun terdapat beberapa perkara keterangan yang menunjukkan bahawa perayu adalah bersalah, tiada satu daripadanya yang sangat penting dan soalan timbul sama ada boleh dikatakan terdapat keterangan yang mencukupi untuk menyokong keputusan bersalah. Soalan itu hendaklah dijawab

memihak kepada perayu oleh kerana keterangan yang diberi oleh pendakwa di dalam kes itu boleh ditafsirkan dengan lebih daripada satu cara. Keterangan itu boleh ditafsirkan sebagai membabitkan perayu atau isterinya atau kedua-dua mereka sekali ataupun pemberi maklumat atau lelaki yang tinggal di rumah itu.

(5) Selepas memeriksa semula keterangan yang dibentangkan oleh pihak pendakwa, mahkamah berpendapat bahawa keterangan itu menimbulkan terlalu banyak soalan yang tidak dapat dijawab dan keterangan itu boleh membabitkan bukan sahaja perayu, tetapi juga orang yang lain.]

Cases referred to

1 *R v Abbott* [1955] 2 All ER 899 (refd)
2 *DPP v Brooks* [1974] 2 All ER 840 (distd)
3 *Gooi Loo Seng v PP* [1993] 2 MLJ 137 (refd)

Appeal from: Criminal Trial No 47(58)–6–86 (High Court, Kota Bharu)

Karpal Singh (*Karpal Singh & Co*) for the appellant.
Idrus bin Harun (Deputy Public Prosecutor) for the public prosecutor.

Edgar Joseph Jr SCJ (delivering the grounds of judgment of the court): This appellant and his wife, Ma Kelthom bte Idris, were jointly charged and tried in the High Court at Kota Bharu upon a charge that they did on their own behalves on the afternoon of 1 February 1986, at an unnumbered house at Jalan Masjid, Kampong Melayu, Gua Musang, in the state of Kelantan, traffic in dangerous drugs, to wit, 592.6g of cannabis, and had thereof committed an offence in contravention of s 39B(l)(a) of the Dangerous Drugs Act 1952 ('the Act').

At the conclusion of the trial, the wife was acquitted and discharged but the appellant was convicted and sentenced to death and against that conviction he had appealed.

The case against the appellant and his wife was this:

On 2 January 1986, as a result of a tip-off, alleging drug trafficking at an unnumbered dwelling house at Jalan Masjid, Gua Musang ('the house'), at about 1pm, a police party which comprised Insp Mat Yusoff Akop (PW4), Sgt Abu Bakar bin Abdullah, DPC Masdan Kahat (PW2), DPC Mohd Hashim bin Mohd Zin (PW8) and PC Azman bin Ithin departed from Gua Musang police station on three motor cycles for the house.

On arrival at the house, Insp Mat Yusoff saw a male Malay standing alone clad only in a loin cloth ('kain basahan') on a platform in front of it. That male Malay was the appellant.

Insp Mat Yusoff then approached the appellant, identified himself and disclosed the object of his visit. He then instructed PC Azman to keep watch at the front portion of the house and Sgt Abu Bakar at the rear.

Upon entering the house, with DPC Masdan Kahat and DPC Mohd Hashim, Insp Mat Yusoff noticed a male Malay later identified as Mohammad bin Mohd Amin, sitting in the lounge near a wall smoking

'rokok daun'. He also noticed four or five children having their meal in the kitchen. All in the house were then required to and did assemble in the lounge.

Insp Mat Yusoff then conducted a search of the house starting from the lounge but found nothing incriminating.

In the course of that search, (which was conducted in the presence of the appellant), he had inspected an almeirah, a radio speaker, a radio cassette player and another almeirah (marked J, K, L and M, respectively, in the sketch plan) to no useful purpose.

But then, Insp Mat Yusoff came to another almeirah (marked I in the sketch plan) which was locked. So he asked for the key from the appellant, who said that it was with his wife. The appellant then called out to his wife who was then outside the house drying clothes. As a result, the wife went up the house and hurriedly went into the kitchen where she climbed the lower shelf of the 'para' (a rack normally used for keeping cooking utensils and related items). She then proceeded to open a wooden box which lay on the upper shelf and tried to take out from it a yellow plastic bag. At this point, DPC Mohd Hashim (who was present throughout the search) also climbed the lower shelf and prevented her from taking out the plastic bag by holding her right hand and instructing her to put the bag back in the box, which she did. DPC Mohd Hashim then announced the discovery to Insp Mat Yusoff by saying: 'Barang ini dah jumpa'. Without further ado, Insp Mat Yusoff shouted to PC Azman who was then outside the house, to arrest the appellant who had taken to his heels as soon as he had heard DPC's announcement of the discovery.

DPC Mohd Hashim then picked up the plastic bag from the box and handed it to Insp Mat Yusoff. Similarly, DPC Mohd Hashim also brought down the wooden box.

In the lounge, in the presence of the wife, Insp Mat Yusoff first opened the plastic bag and found in it dried leaves suspected to be cannabis. On opening the box, he found in it three newspaper packages all of which also contained dried leaves suspected to be cannabis and also some old and unused carpenter's tools. However, the box contained no key or bunch of keys.

Insp Mat Yusoff then summoned a police vehicle and a woman police constable from the police station and, some five minutes later, PC Azman brought back to the house the appellant who was then immediately informed of the discovery of the offending exhibits and these, together with the other contents of the box, were duly shown to him.

The appellant, his wife and the male Malay found smoking in the house, Mohammad, were then taken to the Gua Musang police station where, in a room, and in the presence of the three of them, Insp Mat Yusoff proceeded to carry out a detailed examination of the contents of the plastic bag and the three newspaper packages. As a result, Insp Mat Yusoff found in the plastic bag, 90 sticks of dried leaves, in the first package (with a 'Watan' newspaper wrapping) were 30 sticks of dried leaves, in the next package (with a Chinese newspaper wrapping) were 20 sticks of dried leaves and, lastly, in the remaining package (with a 'Mingguan Kanak-Kanak' newspaper

wrapping) were 19 sticks of dried leaves. In all, there were 159 sticks of dried leaves. And all these were duly sent to the government chemist Mr N Hothaya Jeevan, for analysis and report, who in due course, certified that all the sticks were plant material which was cannabis within the meaning of s 2 of the Dangerous Drugs Act 1952, weighing in all 592.6g.

It was also proved, and indeed freely admitted, that the house belonged to the appellant and his wife and that they and their five children lived there. Similarly, it was freely admitted by the appellant that he was a carpenter by occupation and that the carpenter's tools found in the box were his personal property.

An attempt had been made by the prosecution to adduce in evidence a cautioned statement made by the appellant but, at the conclusion of a trial within a trial, the judge ruled after a most thorough, careful and persuasive analysis of the evidence, that the prosecution had failed to establish its voluntary character and we cannot but agree with his reasons and conclusions for having so held.

However, at the close of the case for the prosecution, the judge ruled that he was satisfied that there was sufficient evidence to attract the presumptions under s 37(d), (g) and (d)(vi) of the Act, with the result that the appellant and his wife were deemed to be in possession of the cannabis and, as its total weight exceeded 200g, were to be presumed, until the contrary was proved, to be trafficking in the same. Apparently, counsel for the appellant and his wife shared that view, for neither made a submission of no case to answer. Accordingly, the judge ruled that there was a case to answer against both the appellant and his wife.

The appellant elected to make his defence from the witness box. What he said was this:

On the morning of 1 February 1986, he was at Kampong Lembaga about half a mile from the house, engaged in working on a newly built house, the property of one To' Haji Omar, and was alone. At about midday, he had gone to his wife's coffee stall and told her that he would be having lunch at home that day. He then returned home and was followed by his wife.

He duly returned home for lunch and saw Mohammad bin Amin and his three children. His wife served lunch which he had with his two children and Mohammad. Having served lunch, his wife left the house to do some washing. Having eaten his lunch, clad only in a loin cloth ('kain basahan') he moved to the lounge near the main door where he had a rest while Mohammad had a smoke there — some four feet away from him. His two children then wanted to have a bath at a nearby brook, so he told them to go ahead and that he would join them later after he had had a short rest.

Just as he was about to leave the house, while still seated at the doorway, he saw four persons, each on a motor cycle, pulling up in front of the house. Having parked their motor cycles, one of the four — DPC Mohd Hashim — approached him saying: 'Saya ada hal dengan awak'.

So, on his invitation, DPC Mohd Hashim entered the house apparently alone. When he attempted to follow DPC Mohd Hashim, the latter promptly told him to sit where he was. While the other three persons remained

outside the house, DPC Mohd Hashim, who was in the lounge, checked the cassette player, radio speakers and the almeirahs (marked J and M in the sketch plan), but found nothing incriminating. DPC Mohd Hashim then moved to another almeirah (marked I in the sketch plan), but found it was locked. The appellant claimed that he did not move from his position while DPC Mohd Hashim carried out his search.

Then another police officer, Insp Yusoff, entered the house and approached Mohammad and asked him where he came from. Mohammad replied: 'Thailand'. Inspector Yusoff then approached DPC Mohd Hashim and was told that the almeirah was locked. On hearing this, Insp Yusoff attempted to open the almeirah but to no avail. Whereupon, DPC Mohd Hashim asked the appellant for the key but the latter replied it was with his wife. Upon being asked to fetch the key the appellant walked up to the door and called out to his wife (who was out of sight though he assumed that she was nearby) to fetch the key. The appellant then went back to where he was before and, just then, he recalled that his two children were having their bath in the brook and decided to go to them. As he did so, his wife passed him, entering the house. He insisted that at no time did he run out of the house as alleged by some members of the police party though he admitted that he did walk briskly in the direction of the brook.

The appellant added that as he left the house, he realized that a male Malay was following him from behind but he took no notice of this. Then, as he was about to go down the steps which led to the brook, this male Malay put his hand round his (the appellant's) neck. This caused the appellant to immediately turn round and, at the same time, to exclaim 'Apa ini'. The male Malay then lost his hold, and the appellant took to his heels.

The appellant said that that male Malay was one of the four persons who had come to his house earlier that day. He was pursued for some 45 yards when, being overcome by exhaustion, he could go no further and stopped. The appellant asked why he was being pursued and was told that someone wanted to search his house. The male Malay then merely held his right hand and brought him back to the house. But, another policeman handcuffed him as he approached his house.

When he was about to walk past the doorway of his house, DPC Mohd Hashim walked up to him and promptly slapped him once on the face. He was then shown the wooden box (P22), which he freely admitted was his. Similarly, he freely admitted that the old and unused tools in it were his. However, he denied all knowledge of the yellow plastic bag (including its contents) which was taken out from the box and shown to him. He said that he was not shown any other packages. He admitted that the wooden box was kept on the second shelf (P19D).

He was then allowed a change of clothes and taken to the Gua Musang police station, but his wife and Mohammad were not taken together with him.

He claimed that he did not usually open the box and that when he did so it was to keep his tools. As for the tools he was using, these were left at the work site.

A The judge, having carefully reviewed the testimony of the appellant, found it to be unreliable, it being riddled with contradictions and lies.

Without embarking on the several points on which he found the testimony of the appellant to be unacceptable, it would be sufficient if we said that the judge preferred the version deposed to by members of the police party as to what actually transpired in and around the house at the material time. In B particular, we would pause to note, the judge rejected the appellant's version that he did not run from the house. The judge found that he did run, but this was only after the police had announced the discovery of the drugs. We shall return to this point a little later. Suffice it to say, that so far as the events at or near the house and the judge's reasoning for preferring C the prosecution's version of those events are concerned, it is difficult to rebut the same.

But one of the crucial points in the case was whether the drugs might have been planted in the box, since the house was, as the judge himself found, still under construction.

The judge was of the view that though the house was still under D construction there was no evidence to show that there had been access to the house through the uncompleted part. With respect, given the fact that this was a case where the police were acting on a tip-off, undoubtedly by an informer, who might have been a paid informer, and the further fact that the house was still under construction, the onus was not on the defence to E prove possibility of access by others but on the prosecution to exclude such possibility. Of course, the defence could besides taking advantage of infirmities in the prosecution case in this regard, have gone further, and shown the possibility of access by others, but this they were not, in law, obliged to do.

To return to the judgment, in fairness to the judge, he did pursue the F point about the possibility of a plant. What he said was this:

> Counsel also makes a faint insinuation of the possible involvement of Mohammad bin Mohd Amin in the commission of the alleged offence, and that could be the reason why he is scared to come to court. I have given a thorough thought to such a possibility but am unable to accept it as I find there is no conceivable G reason for Mohammad to frame the first accused. Most of the time when he was in Gua Musang, he stayed with the first accused. He even worked for him and more or less regarded himself as part of the family. I cannot by any stretch of imagination think of him having a plan to implicate the person who had been more than a friend to him. There is nothing to show that he would stand to gain by it. The insinuation without more remains only an insinuation, without any H evidence to link Mohammad with the alleged offence.

We recognize the force of the judge's reasoning, but motive is not always an easy matter to prove, and there was the testimony of ASP Haji Hamzah bin Awang (PW10), who took over investigations in the case, that he had attempted to secure the attendance of Mohammad at the trial but failed I because Mohammad, who was by then living in Kampong Dusun Nyior, Narathiwat, Thailand, did not dare to come to Malaysia. There was also evidence that most of the time when he was in Gua Musang, Mohammad

stayed with the appellant. In other words, he had liberal access to the house. Then, again, there was the evidence of his presence in the house at the time of the police raid and his arrest by the police. These are matters upon which we did not place undue stress and we therefore mention it, only in passing, to show that Mohammad was a possible suspect.

But there was more substance in the point (not raised by counsel or considered by the judge) that the wife of the appellant might have concealed the drugs in the box without the appellant being a party to such act even though he might have known about it. The charge, be it noted, was trafficking in dangerous drugs and it will be recalled, that it was the conduct of the wife which led to the discovery of the drugs, and certainly the case for the prosecution was that she was involved, for why else was she prosecuted jointly with the appellant? Indeed, the judge ruled, at the close of the case for the prosecution, that she had a case to answer though, admittedly, at the close of the case for the defence, he did acquit her saying in the final part of his judgment:

> However, I am satisfied the second accused has succeeded in rebutting the presumptions, thereby creating a doubt on the case against her. I therefore acquit and discharge her. There is no appeal against her acquittal.

He did not, however, give any reasons for that conclusion and we note that the wife did not implicate the appellant in any way, nor was there any evidence that they were acting in concert.

In this context, we are reminded of the case of *R v Abbott*,[1] where Lord Goddard CJ delivering the judgment of the Court of Appeal of England, said this (at p 901 E–G):

> ... If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case. If, in those circumstances, it were left to the defendants to get out of it if they could, that would put the onus on the defendants to prove themselves not guilty. Finemore J remembers a case in which two sisters were indicted for murder, and there was evidence that they had both been in the room at the time the murder of the boy was committed; but the prosecution could not show that sister A had commited the offence or that sister B had committed the offence. Very likely one or the other must have committed it, but there was no evidence which, and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained that the prosecution should prove the case ...

Another distinct possibility — not considered by the judge — was that the informer, upon whose tip-off the raid on the appellant's house had been conducted, might have planted the drugs in the box. This does not seem to us a fanciful possibility, bearing in mind that the house was still under construction and unfenced at the material time, and both the appellant and his wife were engaged in trade which took them out of doors; he as a carpenter engaged in building a house at Kampong Lembaga for one To' Haji Omar and she as a coffee stall holder at Gua Musang from 6 in the

morning until 12 noon and again from 2.30 in the afternoon until 10 at night.

Having said that, it cannot be gainsaid that the the appellant may very well have concealed the drugs in the box for, after all, the house was his, the box contained his old unused tools, and he did take to his heels upon Insp Mat Yusoff announcing the discovery of the drugs.

But, as against the discovery of the box containing the drugs from his house, there was the evidence of possible access to the house by others which we have referred to and discussed; as for the fact that the appellant's old and unused tools were discovered in the box which contained the drugs, this might be precisely why, if it was a case of a plant, that the person who did so, chose the box in order to implicate the appellant. In any case, we regard this as no higher than a suspicious circumstance.

We now come to what does seem to us to be evidence of a potent kind against the appellant, namely his conduct in taking to his heels upon Insp Mat Yusoff announcing the discovery of the drugs in the box. This conduct of the appellant was consistent with his having known of the presence of the drugs in the box before their discovery, indicating thereby a sense of guilt.

On the other hand, it was conduct equally consistent with the appellant having been in a state of pure panic, bearing in mind that it was only *after* Insp Mat Yusoff announced the discovery of the drugs that the appellant took to his heels. An innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way. It is true that the appellant himself denied running away but we agree with the judge that the appellant lied on this point, but this does not preclude us from drawing such inferences as may be justified from the evidence adduced by the prosecution. The Jamaican Privy Council case of *DPP v Brooks*,[2] cited to us by the learned deputy public prosecutor, where the accused, who occupied the driver's seat of a stationary van which contained more than 1000 lbs of ganja, together with several others in the van, scrambled out and ran off, when police officers hurried towards the van, is, therefore, readily distinguishable.

True it is that though there were several strands of evidence pointing to the appellant's guilt, not one of them alone was of great moment and the question arises, whether *juncta juvant* it could be said that there was sufficient evidence to support a verdict of guilty. It was our view that this question must be answered in favour of the appellant considering that there was more than one way in which the evidence adduced by the prosecution might be viewed. We have already remarked that the evidence could have been regarded as implicating the appellant or the wife or, the both of them, or the informer or even Mohammad.

Having examined the evidence led by the prosecution afresh, we found that the evidence left too many questions unanswered with the result that the proverbial cap might have fitted not just the head of the appellant but that of others as well.

To conclude, we think it not out of place to refer to a recent judgment of this court delivered on 19 April 1993 in *Gooi Loo Seng v PP*:[3]

> Clearly, therefore, the trial judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant

had lost the chance which was fairly open to him of being acquitted. On this point, we consider that non-direction amounts to a misdirection, for in the words of Pickford J in *R v Bundy* 5 Cr App R 270:

> '... the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence'.

We must treat the failure of a trial judge sitting alone, to direct himself correctly in the same way as a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.

In the result, we allow the appeal, quash the conviction and acquit and discharge the appellant.

Appeal allowed.

Reported by Prof Ahmad Ibrahim